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No. 97-406

In the Supreme Court of the United States

OCTOBER TERM, 1997

GEORGES TABCHOURI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals should have ordered an extension of the time allowed by the Board of Immigration Appeals for petitioner to depart voluntarily from the United States in lieu of deportation, when petitioner never requested that relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 119 F.3d 3 (Table). The orders of the Board of Immigration Appeals (Pet. App. 4-7) and the immigration judge (Pet. App. 8-17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1997. The petition for a writ of certiorari was filed on September 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a native and citizen of Lebanon, entered the United States as a nonimmigrant student in March 1987. Pet. App. 5, 8-9. Petitioner did not leave the United States when his student visa expired in December 1991. *Id.* at 5, 9. The Immigration and Naturalization Service (INS) initiated deportation proceedings against petitioner under former Section 241(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(B) (1994), on the ground that he had remained in the United States beyond the period authorized by his visa. Pet. App. 5, 9.

Petitioner admitted the truth of the INS's factual allegations and conceded deportability, but he sought discretionary relief in the form of suspension of deportation under former Section 244(a) of the INA, 8 U.S.C. 1254(a) (1994). Pet. App. 9. Alternatively, he requested, under former Section 244(e)(1) of the INA, 8 U.S.C. 1254(e)(1) (1994), the opportunity to depart from the United States voluntarily, rather than be deported. Pet. App. 9.

In August 1995, after an evidentiary hearing (see Pet. App. 9), an immigration judge (IJ) found that petitioner had failed to establish that his deportation would give rise to the "extreme hardship" required to make him statutorily eligible for suspension of deportation. *Id.* at 12-16; see 8 U.S.C. 1254(a)(1) (1994). In particular, the IJ found (Pet. App. 12-16) that petitioner is a well-educated, self-sufficient adult; that he should be able to obtain employment in Lebanon, or to continue or replicate his present computer and telecommunications consultancy business there; that he has several relatives in Lebanon, all of whom are also self-sufficient; that his family owns income-producing

property in Lebanon; and that all the members of his family are in good health. The IJ also noted (*id.* at 13) that the INS has approved the issuance of an immigrant visa for petitioner, but that the visa could not yet be issued because of applicable quota restrictions.

Although the IJ found petitioner ineligible for suspension of deportation, he did grant petitioner's request for voluntary departure. Pet. App. 16-17. Because petitioner had been in the United States for an extended period and owned part of a business in this country, the IJ allowed him 60 days (rather than the usual 30 days) in which to depart the United States. *Id.* at 17. If petitioner failed to depart voluntarily within that time, he was to be deported to Lebanon. *Ibid.*

The Board of Immigration Appeals (BIA) upheld the IJ's decision. Pet. App. 4-7. While it recognized that petitioner would face a "period of readjustment" upon his return to Lebanon, the Board found "no basis for disturbing the Immigration Judge's finding that [petitioner] has failed to establish extreme hardship if he is deported to Lebanon." *Id.* at 6. The Board also concurred in the IJ's grant of voluntary departure, according petitioner an additional departure period of 30 days from the date of its order, "or any extension beyond that time as may be granted by the [INS] district director." *Id.* at 7.

Petitioner sought review of the BIA's decision in the court of appeals, under the provision for such review contained at that time in Section 106(a) of the INA, 8 U.S.C. 1105a(a) (1994). In a brief per curiam opinion (Pet. App. 1-2), the court affirmed the BIA's order, holding (*id.* at 2) that petitioner had "failed to establish that he will suffer the type of unique or un-

usually severe hardship which would compel a finding of 'extreme hardship,'" and that the Board had not abused its discretion in denying his application for suspension of deportation.

ARGUMENT

1. Petitioner argues (Pet. 8-10) that time accorded him by the Board of Immigration Appeals to depart voluntarily from the United States, rather than be deported, should be reinstated or extended to run from the date of the court of appeals' judgment affirming the Board's denial of other relief. Petitioner did not request that relief either from the court of appeals or from the BIA, and the court of appeals did not address the issue of voluntary departure. See Pet. App. 1-2; Pet. 9; Pet. C.A. Br. 1, 4-8.[1] Petitioner's claim may not be presented to this Court in the first instance. 8 U.S.C. 1105a(c) (1994) (requiring exhaustion of administrative remedies); see 8 U.S.C. 1252(d)(1) (Supp. II 1996) (same requirement after recent amendments); see also, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Demarest* v. *Manspeaker*, 498 U.S 184, 188-189 (1991); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

2. In any event, petitioner's claim is without merit. The Court recently denied review in another case presenting the same question (*Osaren* v. *INS*, No. 96-1653 (Oct. 6, 1997)), and there is no reason for a different result here.

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[1] Petitioner's brief in the court of appeals presented for review only the following question: "Did the Board of Immigration Appeals abuse its discretion by concluding that the Petitioner did not meet the legal prerequisites for suspension of deportation because he had failed to establish that his deportation would result in extreme hardship?" Pet. C.A. Br. 1.

At the time petitioner was found to be deportable, Section 244(e) of the INA, 8 U.S.C. 1254(e) (1994), permitted the Attorney General, in her discretion, to allow any deportable alien who met certain basic qualifications to depart voluntarily from the United States in lieu of deportation. The Attorney General delegated that authority to immigration judges and the BIA in the first instance, and she committed decisions to reinstate or extend the time for voluntary departure in most cases to the "sole jurisdiction" of the INS's various district directors. 8 C.F.R. 244.1-244.2 (1994), revised and renumbered as 8 C.F.R. 240.56-240.57 (62 Fed. Reg. 10,377 (Mar. 6, 1997)). As petitioner observes (Pet. 8), one principal advantage of voluntary departure, from the point of view of a deportable alien, was that it avoided application of the five-year bar imposed by former Section 212(a)(6)(B) of the INA, 8 U.S.C. 1182(a)(6)(B) (1994), on reentry by deported aliens without the specific consent of the Attorney General.

Petitioner argues (Pet. i, 8-10) that an alien should not be forced to choose between seeking judicial review of an order of deportation and taking advantage of a grant of voluntary departure that may expire before review has been completed. Even if petitioner had been put to that choice, his claim would be insubstantial. An alien who has been found to be deportable has no right to voluntary departure, and a choice between taking advantage of that discretionary benefit (on the terms on which it is offered) and pursuing additional legal process as of right (at the end of which the government might prove less accommodating) is little different from the choice that routinely faces criminal defendants in deciding whether to enter into a plea agreement with the government.

See *Castaneda* v. *INS*, 23 F.3d 1576, 1581-1582, on denial of reh'g, 33 F.3d 44 (10th Cir. 1994); compare *Brady* v. *United States*, 397 U.S. 742, 749-753 (1970). Congress has committed the decision whether, and on what conditions, to grant voluntary departure to an eligible alien to the discretion of the Attorney General, and a reviewing court has no authority to extend or reinstate a voluntary departure order that has expired by its terms. See *Castaneda*, 23 F.3d at 1583.

In fact, however, petitioner was not put to the choice that he posits. As petitioner points out (Pet. 6, 9), the Fifth Circuit had, under prior law, asserted the right to review a decision by the BIA not to grant a request, made by an alien in deportation proceedings, to establish a voluntary departure period that would expire only within a specified time after the resolution of any appeal. *Faddoul* v. *INS*, 37 F.3d 185 (1994). Petitioner concedes (Pet. 9), however, that he did not make any such request to the BIA. Having failed to do so, he is not well placed to argue that the failure to accord him such an extension sua sponte somehow compromised his statutory right to seek judicial review.

Finally, we note that petitioner does not allege that he has requested reinstatement or extension of his time for voluntary departure from the INS district director, or that the district director has denied any such request. Having enjoyed a stay of deportation pending appeal, under former Section 106(a)(3) of the INA, 8 U.S.C. 1105a(a)(3) (1994), and having obtained a stay of the court of appeals' mandate pending the disposition of this petition (Pet. App. 3; see Fed. R. App. P. 41(b)), petitioner has, to date, faced no immediate danger of deportation. While petitioner cannot, more than a year after the BIA's decision (see Pet. App. 4),

plausibly contend that he requires any substantial additional amount of time to wind up his affairs in the United States, there is no reason to assume that the appropriate INS district director would deny a timely request by petitioner for reinstatement of a brief period for voluntary departure.[2]

3. As petitioner points out (Pet. 4-8), the courts of appeals adopted different approaches to reviewing deportable aliens' requests for judicial orders reinstating or extending the time for voluntary departure accorded them under former Section 244(e) of the INA, 8 U.S.C. 1254(e) (1994). Some courts correctly held that they lacked jurisdiction to reinstate or extend an administrative grant of voluntary departure under that provision. See, *e.g.*, *Nkacoang* v. *INS*, 83 F.3d 353, 356-357 (11th Cir. 1996); *Castaneda*, 23 F.3d at 1578-1583 (reviewing cases). Other courts asserted jurisdiction to reinstate or extend such a grant under varying circumstances. See, *e.g.*, *Faddoul*, *supra*; *Ramsay* v. *INS*, 14 F.3d 206, 211-213 (4th Cir. 1994) (while decision should "usually" be left to district director, court will extend departure period where INS does not suggest any reason for district director to deny reinstatement apart from alien's decision to appeal); *Contreras-Aragon* v. *INS*, 852 F.2d 1088 (9th Cir. 1988) (en banc) (period for voluntary departure does not begin to run until issuance of

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[2] That decision would, of course, rest solely in the discretion of the district director, and we make no representation that such a request would be granted. Our point is simply that petitioner offers no reason to believe that district directors routinely refuse to reinstate or extend the time for voluntary departure for an otherwise eligible alien simply because the alien has sought judicial review. See *Kaczmarczyk* v. *INS*, 933 F.2d 588, 598 (7th Cir.), cert. denied, 502 U.S. 981 (1991).

court of appeals' mandate affirming BIA's order). As noted above (see page 6, *supra*), the Fifth Circuit in *Faddoul* established a procedural mechanism under which petitioner could have obtained judicial review if the BIA had denied a request to extend the period of departure to accommodate an appeal, and the divergence in approach that petitioner identifies is therefore of limited relevance to this case. To the extent, however, that petitioner might have received even more favorable treatment in some other circuit (see Pet. 9), recent statutory changes have deprived the issue of any continuing importance.

On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 309(c)(4)(E) of IIRIRA, 110 Stat. 3009-626, provides that, in judicial review of any final order of deportation entered on or after October 31, 1996, "there shall be no appeal of any discretionary decision under section * * * 244" of the INA (as in effect when IIRIRA was enacted). Because former Section 244(e) conferred the authority for grants of voluntary departure, IIRIRA settles, prospectively, any dispute about a court of appeals' authority to review or alter the BIA's exercise of the Attorney General's discretion in that regard.

In addition, Section 308(b)(7) of IIRIRA, 110 Stat. 3009-615, repeals former Section 244 in its entirety, as part of a general revision of the provisions relating to deportation (now known as "removal"). Former Section 244(e) has been replaced with new Section 240B of the INA, 8 U.S.C. 1229c (Supp. II 1996), providing for the discretionary grant of voluntary departure under certain circumstances. New Section 240B(f), 8 U.S.C. 1229c(f) (Supp. II 1996), specifies

that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure" entered at the conclusion of removal proceedings; and new Section 242(a)(2)(B), 8 U.S.C. 1252(a)(2)(B) (Supp. II 1996), reiterates that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 240B."

Neither IIRIRA's preclusion of judicial review of decisions under old Section 244(e) nor its new provisions concerning voluntary departure apply to petitioner's case, because the administrative deportation proceedings against petitioner were commenced and concluded before October 31, 1996. See IIRIRA § 309(a) and (c), 110 Stat. 3009-625. In light of the statutory changes and jurisdictional clarifications enacted by IIRIRA, however, the issue that petitioner seeks to raise in this case is of no continuing importance and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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